IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.303 OF 1989

Anna Yesu Chougule @ Chavan .. ..Appellant

Versus

Narayan Bala Chougule @ Chavan

since deceased

Smt. Prematai Narayan Chavan & Ors. ..Respondents

Mr.Nitin Mhatre with A.K.Abhyankar for appellant

Mr.Pradip Patil with Mr. B.R.Patil for Respondents

CORAM : P.V.KAKADE, J.

DATE : 6TH OCTOBER, 2004

P.C.:

1. This is an appeal preferred by the appellant original plaintiff against the judgment and order passed by the learned Addl. District Judge, Sangli dated 7th October, 1988 allowing the appeal of the respondents and

reverting the order passed by the Civil Judge, Junior Division, Islampur dated 5th October,1981 whereby the suit was decreed and plaintiff's share was defined as to 1/2 share in the suit property and suit was also decreed for separate possession thereof.

2. I heard both the learned counsel. Perused the record including the judgments of both the courts below.

. The plaintiff came with the case that the suit property originally belonged to one Hari Chaugule, the grand father of Plaintiff and defendant. They are the Inam Lands of Chougule Watans. It was being held by the Joint family of plaintiff and defendants. The Watan was abolished. At that time suit lands were in the name of Bala Hari Chaugule, the uncle of the present plaintiff and father of defendant nos.1 to 4, as he was Manager of Joint family in a proceeding being WTN/SR/70, dated 17th March 1940. The Sub Divisional Officer regranted suit lands in the name of Bala Hari for an on behalf of the joint family consisting of plaintiff and defendants. As the lands were regranted in the name of Bala Hari, it was shown to his name to the record of right.

. The present plaintiff filed the civil suit bearing No.418 of 1950 for partition and separate possession of his share in the joint family property. The suit lands were subject matter of that suit. The suit lands were Inam lands and they were not transferable, the Court refused to give separate share in the present suit lands in the partition suit to the plaintiff. The suit was decreed so far as the other lands were concerned. It was contended that plaintiff and defendants were in possession of the suit lands and it was standing in the name of Bala Hari, as Manager of the joint family, plaintiff was entitled to get share. Therefore the findings to that effect of that court is said to be illegal, ultravires and without jurisdiction. The plaintiff has constructed, his house in S.No.88/1, which is the subject of the suit and he is living there as of right since long. That land was also a Watan land and he is in possession and Vahiwat of that land. Therefore he is entitled to get separate share in all of the suit lands. It is alleged that by a recent decision of our High Court that, the lands regranted after abolition of Watan have become Rayatava lands and as such they have become partible. Therefore, plaintiff is entitled to get share in the suit land. In view of the

changed position of law, therefore, the suit said to be not barred by the principal of res judicial.

. The defendants challenged the suit mainly on the ground that in view of that findings recorded by the lower court in earlier Suit No.418 of 1950 cannot binding upon them and the suit deserves to be dismissed.

. The learned trial judge adjudicated the suit on merits and came to the conclusion that in view of change position of law and as such decreed the suit and decided that the plaintiff had 1/2 share in the suit property and therefore he was entitled to separate partition.

3. Being aggrieved by the said Judgment and order defendant preferred an appeal in District Court, Sangli. The learned District Judge heard the appeal on merits and came to the conclusion that though the suit property is partible and plaintiff is entitled to partition, the suit is barred by the principal of res judicata and therefore, the appeal was allowed and lower court’s order of the decree was set aside. Hence the present appeal.

4. At the outset it may be noted that it is evident that following the principles in the case of Nagesh Bisto Desai vs. Khando Tirmal Desai etc. - AIR 1982 SUPREME COURT 887 the legal position has changed wherein it was held that an estate is impartible does not make it separate and exclusive property of holder, where the property is ancestral and the holder has succeeded to it, it will be part of the joint estate of the undivided family. The grant of Watan to the eldest member of a family does not make the watan properties the exclusive property of the person who is the watandar for the time being. The impartiability of property does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line. The Apex Court further held that the effect of Act No.60 of 1950 and Act No.22 of 1955 was to bring about a change in the tenure or character of the holding as watan land but they did not affect the other legal incidents of the property under personal law. This decision was followed

by our Court vide AIR 1988 Bombay 149. Therefore there is no doubt whatsoever that there is changed in legal position by virtue of said Watan Abolition Act noted earlier.

5. In the case of Mathura Prasad Sarjoo Jaiswal and Ors. vs. Dossibai N. B. Jeejeebhoy - AIR 1971 SC 2355 the apex court observed thus -

> "5. But the doctrine of re judicata belongs to the domain of procedure, it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent court on a matter in issue may be res judicata in another proceeding between the same parties; the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed

law and fact decided by a competent court is finally determined between the parties and cannot be reopened between them in another proceeding. The previous decision on a matter in issue alone is res judicata : the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision : the decision on law cannot be dissociated from the decision

> on facts on which the right is founded. a decision on an issue of law will be as res judicata in subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law."

Therefore, it is clear that the ratio laid down by the Supreme Court makes it crystal clear that there are certain exceptions to the general procedural principles of res-judicata one of those being that when the law has, since the earlier decision, been altered by a competent authority. In the present case before us as there is change in law. The learned lower Appellate Court Judge has observed that there will be no res judicata, with regard to the question of law, provided there is different cause of action. He proceeded to

observe that in the given case, the point at issue in the earlier suit before the earlier court was whether the estate was partible and the learned trial court held that it was not partible and it was impartially, and therefore, the present suit does not give any different or separate cause of action. In my considered view the learned appellate court has wrongly interpreted the ratio of the Mathura Prasad case (supra) which stipulates in clear terms that the principle of resjudicata would not be applicable when the law has since the earlier decision been altered by a competent authority. The earlier decision was in the case of the suit of the year 1950, thereafter the law has been changed and thus it is quite clear that the suit cannot be said to be barred by the principle of res judicata.

6. This was the only point said to be raised and urged by the parties, in view of this aspect the appeal deserves to be allowed. Hence the appeal is allowed. The Judgment and order passed by the Addl. District Judge dated 7.10.1988 is hereby set aside and the judgment and order dated 5.10.1981 passed by Civil Judge, Junior Division, Islampur is restored and confirmed. In the circumstances there shall not be any

order regarding costs.

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